NO. 87-467

Supreme Court, U.S.
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In The
Supreme Court of the United States
August, 1987

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

vs

JOHN NELSON,
Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE FAILURE OF THE TRIAL COURT TO GIVE A DEFINITION OF THE TERM "TORTURE" AS AN AGGRAVATING CIRCUMSTANCE VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND STANDARDS ENUNUCATED IN FURMAN vs. GEORGIA 408 U.S., 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1982); COMMONWEALTH vs. ZETTLEMOYER 500 Pa. 16 454 A.2d 937 (1982), cert denied, 461 U.S. 970 103 S. Ct. 2444, 77 L. Ed. 2d 1327 (1983), COMMONWEALTH vs. PURSELL 495 A.2d 183 (Pa. 1985) and STATE V. DIXON Fla. 283 So. 2d 1 (1973).

II. DOES THE ACTION OF THE PENNSYLVANIA LEGISLATURE IN ENACTING 42 Pa. C.S.A. §9711(h) DEALING WITH THE STATE SUPREME COURT'S POWER TO REVIEW THE IMPOSITION OF A DEATH SENTENCE PROVIDING THAT A DEATH SENTENCE MAY BE VACATED AND A LIFE IMPRISONMENT SENTENCE IMPOSED WITHOUT A SENTENCING REHEARING VIOLATE THE DUE PROCESS CUARANTEES OF THE COMMONWEALTH/VICTIMS AND SURVIVORS OF HOMICIDE CASES CONSIDERING IN ALL OTHER TYPES OF CASES IN THE COMMONWEALTH WHEN A SENTENCE IS VACATED THERE IS A SUBSEQUENT REHEARING.

III. DOES THE ACTION OF THE PENNSYLVANIA LEGISLATURE IN ENACTING 42 Pa. C.S.A. §9711(h) WHICH PROVIDES THAT A DEATH SENTENCE MAY BE VACATED AND A SENTENCE OF LIFE IMPRISONMENT IMPOSED WITHOUT A REHEARING CONSTITUTE INVIDIOUS DISCRIMINATION AGAINST HOMICIDE VICTIMS/ SURVIVORS VIOLATING THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

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PETITION FOR A WRIT OF CERTIORARI
FROM THE SUPREME COURT OF PENNSYLVANIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered on April 3, 1987 vacating the judgment of the Court of Common Pleas of Erie County, and remanding for imposition of a life sentence. Petition for reargument in the Supreme Court filed on the 23rd day of June, 1987. The Petition for reargument was denied.

OPINION BELOW

Respondent was found guilty by a jury in the Court of Common Pleas of Erie County, Pennsylvania of murder in the first degree and was given a death sentence by the jury after the jury had found one aggravating circumstance of torture which out weighed any mitigating factors. Respondent's conviction was appealed to the Pennsylvania Supreme Court on a direct appeal and the Supreme Court of Pennsylvania on April 3, 1987 vacated the judgment of the lower court

and remanded for imposition of a life imprisonment sentence. Petitioner filed a timely Petition for reargument which on June 23, 1987 was denied per curiam by the Pennsylvania Supreme Court at 43 W.D. Appeal Docket 1984.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1), an appeal from the final judgment of the State Court of last resort.

PARTIES

The caption of the case contains the names of all parties to the proceeding before the Supreme Court of the State of Pennsylvania.

REPORTS

The opinions of the Pennsylvania Supreme Court is reported at 43 W.D. Appeal Docket 1984 (J-148-1986).

STATUTES AND REGULATIONS INVOLVED

42 Pa. C.S.A. §9711(d)(8); Aggravating circumstances - aggravating circumstances shall be limited to the following: the offense was committed by means of torture.

42 Pa. C.S.A. §9711(h); Review of the death sentence - (1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules. (2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence. (3) The Supreme Court shall affirm the sentence of death unless it determines that :

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

Eighth Amendment to the United States Constitution.

Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On February 14, 1983 sometime after 8:30 p.m. the Respondent, John A. Nelson, killed his wife, Sara Nelson, by a series of attacks upon her, which included striking her with a claw hammer, stabbing her repeatedly with a wood chisel and ultimately strangling her with a cord. The victim was hit on the left side of the head above the ear with the claw end of an ordinary claw hammer. She was stabbed six times with a wood chisel, but only three of the thrusts actually punctured the chest area. After perpetrating these assaults, the Respondent went to another location and obtained an electrical cord. He returned to his victim

and strangled her with the cord. The pathologist who testified during the trial, indicated that the wounds by themselves would not have caused the victim's death. It was the stranglation with the electrical cord which brought about the victim's death. After a trial by jury on September 21, 1983, the Respondent was convicted of the crime of first degree murder, 18 Pa. C.S.A. §2501/2502 and Possession of Instruments of a Crime, 18 Pa. C.S.A. §907. In the sentencing hearing for the murder conviction, the jury fixed the penalty at death based upon the aggravating circumstances of torture 42 Pa. C.S.A. §9711(d)(8). The Respondent filed a Motion for New Trial and/or Arrest of Judgment which was briefed and argued and on April 17, 1984 the lower court denied the Respondent's Motion for New Trial and/or Arrest of Judgment and furnished a written Opinion which is included in the Appendix. A direct appeal was taken to the Supreme Court of Pennsylvania alleging among other issues that the lower court's charge to the jury during the sentencing phase of the trial was insufficient considering that there was no definition of the term "torture". Therefore, the

instruction was insufficient as a matter of law. In an Opinion and Order filed April 3, 1987, the Supreme Court in a four/three decision, vacated the judgment of the Court of Common Pleas of Erie County and remanded the case for imposition of a life sentence based on the failure of the trial court to give a definition of the term "torture" in its instructions to the jury. The Petitioner filed a Motion for reargument with the Pennsylvania Supreme Court and on June 23, 1987 the Petition for Reargument was denied per curiam.

This Petition for Writ of Certiorari is from the Order of the Pennsylvania Supreme Court dated June 23, 1987, denying the Petitioner's Petition for Reargument.

REASONS FOR GRANTING THE WRIT

The reason given by the majority of the Pennsylvania Supreme Court for the vacation of the death sentence was that the jury charge given during the sentencing phase of the instant case was prejudically deficient and that trial counsel was ineffective in his assistance when he failed to make a timely

objection to the charge. The majority of the Court felt that the trial court's failure to give a definition of the term "torture" an aggravating circumstance under 42 Pa. §9711(d)(8), which indicated that there must be more than a mere intent to kill to have a finding of "torture". Implicit in subsection 8 is the requirement of an intent to cause pain and suffering in addition to the intent to kill. There must be an indication that the killer is not satisfied with the killing alone" (slip opinion). The majority in its Opinion attempted to distinguish, Commonwealth vs. Pursell, 508 Pa. 212 495 A.2d 183 (1985) by indicating that the lower court in Pursell, gave the jury a charge which contained a sufficiently guiding definition of the word "torture". However, the majority misapprehended a controlling relevant authority in Pursell which specifically stated that "when the means of torture are employed, we can believe, without a reasonable doubt, that the user of such means intended to torture his or her victim to death. What is intended to be included are those murders of the first degree where the actual commission of the offense included

such concurrent acts as to set the crime apart from the norm of capital felonies -- the consecienceless or pitiless crime which is unnecessarily painful to the victim (see State v. Dixon, Fla. 283 So. 2d 1 (1973), where the Supreme Court of Florida construed its death penalty statutes aggravating circumstance on "especially heinous, atrocious or cruel" as the consciencelessness or pitiless crime which is unnecessarily torturous to the victim")". Commonwealth vs. Pursell, 495 A.2d at 197.

Clearly, the majority in Pursell rejected the notation that the specific requirement of the term "torture" included a definition by the Court of the specific intent to cause additional pain and suffering.

It is clear that the Supreme Court in Commonwealth vs. Pursell, supra, clearly rejected the notation that specific intent to cause pain and suffering was a requirement for an aggravating circumstance of torture. The majority in Pursell went on to indicate that the specific aggravating circumstances of torture to be weighed by the jury

considering whether the death penalty should be imposed is a "sufficiently specific factor because we fell that the meaning of such a term is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended." Commonwealth vs. Pursell, 495 A.2d at 196.

The Pennsylvania Supreme Court realizes that any challenge to the sentencing code established in Pennsylvania must be evaluated in light of the requirements of Furman vs. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Furman imposes on the states the responsibility of drafting sentencing codes which would guide and channel the sentencing authorities discretion by resorting to the examination of specific factors that argue in favor or against the imposition of the dealth penalty. Total arbitrariness is thus eliminated in the imposition of a sentence of death. Pennsylvania's death penalty statute has already been challenged and upheld by the Pennsylvania Supreme Court and Certiorari has been denied in attacks related to the imposition of the death penalty under the drafted sentencing procedures

in Pennsylvania. Commonwealth vs. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert denied, 461 U.S. 970, 103 S. Ct. 2444, 77 L. Ed. 2d 1327 (1983).

The Pennsylvania Supreme Court has ruled that the sentencing procedures relating to the imposition of the death penalty are specific enough to satisfy the requirements of Furman. The Pennsylvania Supreme Court has also reviewed a challenge to 42 Pa. C.S.A. §9711(d)(8) in the above stated Commonwealth vs. Pursell. The language in Pursell dealing with the aggravating circumstances of torture, is quite clear in that the Pennsylvania Supreme Court indicated that the aggravating circumstance of the offense was committed by the means of torture (42 Pa. C.S.A. §9711(d)(8) is not vague. Accordingly, the jury is channelled from a totally arbitrary and capricious imposition of the death penalty." Commonwealth vs. Pursell, 495 at 196.

It is clear that the Pennsylvania Supreme Court has had held that the specific section of the Senetncing Code relating to imposition of the death penalty and the aggravating circumstances of torture clearly is not vague and therefore meets the requirements

as set forth in Furman vs. Georgia. The three judges of the Pennsylvania Supreme Court who dissented in the case at bar all indicate that the lower court properly instructed the jury as set forth in the sentencing procedures of 42 Pa. C.S.A. §9711. All the judges agree that there was sufficient evidence presented by the Petitioner during the course of the trial to establish that in fact that the victim had been tortured. The Pennsylvania Supreme Court erred in vacating the imposition of the death sentence in the case at bar since the Commonwealth's statutes dealing with the imposition of the death penalty has met constitutional muster and has been accepted and approved by the Pennsylvania Supreme Court. It is clear that the lower court followed all the mandates established by the statute relating to death penalty cases (42 Pa. C.S.A. §9711). However, in vacating the imposition of the death penalty in the case at bar, the Pennsylvania Supreme Court placed on the Commonwealth an unjust burden of anticipating a judicial change of heart. It is clear that the Pennsylvania Supreme Court in the case at bar did not

follow its own mandates set forth in Commonwealth vs. Pursell and also is attempting to hold the Commonwealth to an improper standard other than is set forth in Furman vs. Georgia. If as the Pennsylvania Supreme Court has determined in Commonwealth vs. Pursell, 42 Pa. C.S.A. §9711 (d)(8) is not void for vagueness and if torture "is a sufficiently specific factor because we feel that the meaning of such a term is a matter of common knowledge, so that an ordinary man would not have to guess at what was "intended" then their decision in Commonwealth vs. Nelson is clearly an error of constitutional proportions and is in conflict with Commonwealth vs. Pursell, Commonwealth vs. Zettlemoyer, Furman vs. Georgia and State v. Dixon and also in conflict with the legislature of Pennsylvania which established 42 Pa. C.S.A. §9711.

42 Pa. C.S.A. §9711(h) sets forth that in a review of death sentences by the Pennsylvania Supreme Court it shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence. The

Petitioner believes that we should be permitted to set forth to a jury the facts which we believe would establish that this killing was committed by an aggravating circumstance, that being "torture" and to have a jury empaneled at which time they could decide the sentence of the Respondent, which was the intention of the legislature by creating the sentencing phase of a capital case wherein a jury would decide the sentence. In the case at bar, the Pennsylvania Supreme Court vacated the death sentence even though by its own acknowledgement there was sufficient evidence to establish the aggravating circumstances of "torture" beyond a reasonable doubt. The Commonwealth victims/ survivors of homicide cases are denied the opportunity to see that due process is done not because the Respondent was denied any rights, but simply because of a disagreement as to a definition of torture. It is clearly established in Pennsylvania that in all non-capital cases where the sentence is vacated by an appellate court, the case is remanded to the lower court for resentencing. In doing so, the appellate court recognizes that there is no violation of a

defendant's double jeopardy right and it is clear that the sentencing function should be left to the sentencing judge. In a capital case, the jury determines the penalty to be inflicted upon an individual and it can only be guided by the trial court and the trial court's direction. If a jury is not given that opportunity, then it is clear that the legislature's intent to have the citizens of the Commonwealth of Pennsylvania determine the sentences to be imposed in capital cases is clearly defeated. The Pennsylvania Supreme Court by vacating the sentence of death and imposing a sentence of life imprisonment without giving a jury the opportunity to rehear the factors in order to make a determination as to what the sentence in fact should be, clearly is discriminating against a clearly defined group of individuals. This invidious discrimination rests with victims and survivors of homicide cases who are not given the opportunity to equal protection under the law as guaranteed by the Fourteenth Amendment of the United States Constitution.

Further, the citizens of the Commonwealth of Pennsylvania as well as the victims/survivors of homciide cases are denied due process of law. The reasons set forth for the remand for the imposition of a life imprisonment sentence are set forth in 42 Pa. C.S.A. §9711(h)(3). The legislature established three separate reasons in which the Supreme Court of Pennsylvania could vacate a death sentence and remand for the imposition of a life imprisonment sentence. Those reasons are: (i) the sentence of death was a product of passion, or prejudice, or any other arbitrary factor; (ii) the evidence failed to support the finding of an aggravating circumstance specified in (d); or (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant. An examination of the record of the case at bar and the evidence presented at trial, clearly establishes that none of those three reasons have been established by the Pennsylvania Supreme Court. The error that was set forth by the majority Opinion

dealt with the lower court's failure to properly define the term "torture". That factor is not contained in the three factors which would allow the Pennsylvania Supreme Court to vacate and remand for the imposition of the life sentence. It appears that the Pennsylvania Supreme Court in remanding for the imposition of a life sentence is violating the legislature's intent that a jury determine the penalty to impose in a capital case in Pennsylvania. It is clear that the legislature's intent was to have a jury of the Respondent's peers determine what the sentence would be in a capital case under clearly defined circumstances. It would appear that if in fact the lower court committed an error by failing to properly instruct the jury on "torture", then the remedy should require that a jury determine the sentence to be imposed under the definition of "torture" as determined by the Pennsylvania Supreme Court. There is no compelling state interest in circumventing the legislature's intent of having a jury determine the sentence to be imposed. It is clear that if the case was remanded for a resentencing

hearing, a defendant would not be denied due process or equal protection of the law as long as the requirements set forth in the sentencing guidelines were again followed by the jury in making its determination.

It is clear that the Commonwealth would be put to an expense in relitigating the sentencing phase of a capital case. However, to ensure that due process and equal protection of law is provided to this suspect class of individuals, that being victims/survivors of homicide cases, that minimal expense is far out weighed by the rights of those individuals. It is obvious that the Commonwealth of Pennsylvania does not consider the financial aspects of retrials or resentencing procedures guaranteed to defendants for violations or error occurring during the course of their trials or sentencings in non-capital cases. Therefore, the same right and privilege must be guaranteed to victims/survivors of homicide cases. Further, it is unjust to set apart defendants in homicide cases in such a manner as to afford them the luxury of escaping a sentence of death simply because

of an error committed during the course of their sentencing hearing. It would appear that if the logic applied to capital cases and the vacation of death sentences and the imposition of life sentences were to be applied to non-capital cases, then defendants who had their sentences vacated in a non-capital case should then be given probationary sentences without the necessity of a rehearing.

It is quite clear as in the case at bar, that the imposition of a death sentence is quite justified. The Respondent appears to have been able to avoid the just punishment for his offense simply because of an alleged error committed by the trial court. Since the alleged error that the trial court committed was not covered under any of the factors set forth in 42 Pa. C.S.A. §9711(h) and in order to guarantee due process and equal protection the proper remedy should be the remanding of the case to the Erie County Court of Common Pleas of the Sixth Judicial District of Pennsylvania for a rehearing so that a jury can impose a sentence as set forth in 42 Pa. C.S.A. §9711

CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse the judgment of the Supreme Court of Pennsylvania entered herein.

Respectfully submitted,

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